

**United States Department of Labor
Employees' Compensation Appeals Board**

ELMER C. JONES, Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Washington, DC, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 04-917
Issued: October 12, 2004**

Appearances:
Elmer C. Jones, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 23, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 30, 2004, regarding an overpayment of compensation.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue in this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$32,048.20 was created; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly found that the overpayment should be repaid by deducting \$200.00 every four weeks from continuing compensation.

¹ The Board notes that the Office's January 6, 2004 decision was reissued on January 30, 2004.

FACTUAL HISTORY

The Office accepted that on April 14, 1985 appellant, then a 30-year-old firefighter, suffered a cervical and lumbar strain in the performance of duty and subsequently accepted the condition of adjustment disorder as being work related. Although he was released to work with restrictions in 1991, appellant has not returned to employment.

In a letter dated March 26, 2003, the Office notified appellant of a preliminary determination that an overpayment of compensation totaling \$32,048.20 had occurred. The Office found that, during the period January 13, 1986 through January 26, 2002, health premium benefits were deducted from code 101, but should have been deducted under code 102, as he had family coverage during that time. The Office also found that, during the period January 27 through November 2, 2002, health benefit premiums were deducted under code 104, but should have been withheld under code 105 as appellant had family plan coverage during that time. The Office advised him that it found him to be without fault in creating the overpayment. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support of any request for waiver.

On May 9, 2003 the Office received appellant's Form OWCP-20 dated April 14, 2003, which listed his family's monthly income as \$30,102.00. No other financial information such as, expenses or information about his savings, were provided. In a May 13, 2003 letter, the Office requested that appellant review the April 14, 2003 OWCP-20 form and confirm his monthly income as well as list his monthly expenses. On July 1, 2003 the Office received another copy of his April 14, 2003 OWCP-20 form. Monthly income was noted as being \$2,041.58, which comprised of \$1,593.02 from appellant's wife's salary and \$448.56 from workers' compensation payments. Monthly expenses were noted as being: \$499.00 for rent/mortgage; \$200.00 for food; \$202.00 for utilities; \$311.00 for other expenses; and monthly creditor expenses of \$341.00 to Citibank and \$196.00 to FNANB. The checking account balance was listed as \$25.00 with \$50.00 in the savings account.

By decision dated January 6, 2004, the Office finalized its determination that a \$32,048.20 overpayment had occurred. The Office found that appellant was not entitled to waiver of the overpayment and that the overpayment would be collected by deducting \$200.00 from continuing compensation payments effective January 25, 2004.

On January 14, 2004 the Office received a January 9, 2004 letter from appellant's congressman with a statement of financial status of both appellant and his wife along with financial documents.

On January 30, 2004 the Office reissued the January 6, 2004 decision, noting that there were corrections on the second page. The second-page corrections advised that interest would accrue at the rate of one percent and the overpayment would be collected on or about March 4, 2017 as opposed to March 3, 2018. Appeal rights along with a debt amortization schedule were attached. However, the memorandum advising why waiver was denied was not attached.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits program. The regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.”²

In addition 5 C.F.R. § 890.502(d) provides:

“An agency that withholds less than or none of the proper health benefits contributions from an individual’s pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.”³

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁴ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁵ The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered.⁶

Section 8129(a) of the Federal Employees’ Compensation Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.⁷

² 5 C.F.R. § 890.502(b)(1).

³ *Id.* at § 890.502(d).

⁴ *Id.* at § 890.502(b)(1).

⁵ *Id.* at § 890.502(d).

⁶ *See Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C. F. R. § 890.502.

⁷ *See* 5 U.S.C. § 8129(a).

ANALYSIS -- ISSUE 1

The record reflects that from January 13, 1986 to January 26, 2002 the Office deducted health premiums under enrollment code 101, while premiums under code 102, should have been withheld as appellant had a family plan coverage during that time. The record further reflects that from January 27 to November 2, 2002 the Office withheld premiums for code 104, but should have withheld code 105, as appellant had another family plan coverage during that time. The Office's failure to deduct the premiums for health insurance under the family plan coverage during the appropriate periods resulted in an overpayment of \$32,048.20.

The record indicates that appellant was responsible for the health insurance premium issued under the family plan coverage during the periods January 13, 1986 to January 26, 2002 and January 27 to November 2, 2002. From January 13, 1986 to January 26, 2002, appellant paid premiums in the amount of \$28,348.67 for health code 101, but should have paid premiums of \$59,322.67, under health code 102, as he had family coverage. Likewise, during the period from January 27 to November 2, 2002, appellant paid \$822.40 for health code 104, but should have paid \$1,896.60 under health code 105, as he had family coverage. The difference from the amount owed, \$61,219.29, from the amount paid, \$29,171.07, results in an overpayment of \$32,048.20 for the entire period encompassing January 13, 1986 to November 2, 2002. The record shows that the Office correctly determined that premiums for health insurance were incorrectly deducted from the appropriate periods at a lower rate than appellant's family coverage, resulting in an overpayment of \$32,048.20. He has not contested the amount of the overpayment. Therefore, an overpayment of compensation in the amount of \$32,048.20 was created during the period January 13, 1986 through November 2, 2002, when the Office failed to deduct the correct premiums for health insurance from appellant's compensation benefits.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defect the purpose of the Act or would be against equity and good conscience.⁹

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ If the Office finds that the

⁸ *Id.*

⁹ *See* 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.433(a).

recipient of an overpayment was not at fault, repayment will still be required unless:

(1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Act; or

(2) adjustment or recovery of the overpayment would be against equity and good conscience.¹¹

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹²

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹³

ANALYSIS -- ISSUE 2

With regard to the denial of the waiver of overpayment, the only findings made by the Office in its January 30, 2004 decision were noted as: “[a]fter carefully studying your case and fully considering any additional evidence or arguments submitted, we have decided not to waive the overpayment. The reasons for this decision are explained in the enclosed memorandum.” As noted, the memorandum addressing weaver is not of record. The record does contain a January 6, 2004 memorandum which references the OWCP-20 form which the Office received on July 1, 2003.

It is an elementary principle of workers’ compensation law, which the Board has often reiterated, that the Office is required to make findings of fact and a statement of reasons regarding the material facts of the case.¹⁴ In this case, the Office’s failure to explain the basis for its finding on waiver precludes the Board’s review of this issue. Appellant had submitted

¹¹ *Id.* at § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437(b).

¹² *Id.* at § 10.438(a).

¹³ *Id.* at § 10.438(b).

¹⁴ See *Beverly Dukes*, 46 ECAB 1014, 1017 (1995); *James B. Bowers*, 44 ECAB 121, 123 (1992); 20 C.F.R. § 10.126.

financial information which was not addressed. The January 30, 2004 compensation order is incomplete and does not provide sufficient detail so that the claimant would understand the reasoning behind the decision as it lacks a memorandum explaining the rationale for denying waiver decision.¹⁵ The case will be remanded for the Office to provide reasons with direct references to the financial information submitted on January 14, 2004 for determining whether waiver would be allowed. Upon further development, the Office should address the financial information submitted comparing appellant's total monthly income with his total monthly expenses and address his liabilities and assets. If waiver is denied, the Office should then determine the monthly deduction and explain why it is reasonable. Upon further development that it deems necessary, the Office should issue a *de novo* decision.¹⁶

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation of \$32,048.20 during the period January 13, 1986 to November 2, 2002 as the Office failed to deduct the correct premiums for health insurance from his compensation benefits. The Board further finds that the case is not in posture for decision over the issue of whether the Office properly denied waiver of the overpayment of compensation.

¹⁵ See *Beverly Dukes, id; Patrick Michael Duffy*, 43 ECAB 280 (1991).

¹⁶ In light of the Board's finding on the waiver issue, the issue pertaining to deductions from appellant's continuing compensation is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 30, 2004 are affirmed in part and remanded for further action consistent with this decision.

Issued: October 12, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member